FILED
SEP 26 1995
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No. 95-308

In The

Supreme Court of the United States

October Term, 1995

PALM BEACH COUNTY, *et al.*,

Petitioners,

vs.

WEST PENINSULAR TITLE CO., a Florida corporation, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners should be relieved from tactical decisions they made during the litigation that were reflected in the pretrial stipulation?

2. Whether Petitioners may rely on affirmative defenses as to which they introduced no evidence at trial?

3. Whether a petition for certiorari may be based upon an alleged conflict with a decision never cited by Petitioners in the courts below?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Respondents, West Peninsular Title Company, a Florida corporation ("West Peninsular"); Absolute, Inc., a Florida corporation ("Absolute"); and Marion H. Cooper, as Personal Representative of the Estate of Alfred R. Cooper ("Cooper"), certify that the following persons or entities have an interest in the outcome of the appeal:

ABSOLUTE, INC., Plaintiff/Appellee/Respondent

ANDREWS, JAMES H., President, WEST PENINSULAR and ABSOLUTE

COOPER, MARION H., Personal Representative of the Estate of Alfred R. Cooper

Honorable EDMONDSON, J.L., Appellate Judge

Honorable GONZALEZ, JR., JOSE A., Trial Judge

Honorable HATCHETT, JOSEPH W., Appellate Judge

Honorable MELTON, HOWELL W., Appellate Judge

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ROBERTS, CAROLA., Defendant/Appellant/ Petitioner

SMITH, WILLIAMS & BOWLES, P.A., Law Firm representing Plaintiffs/ Appellees/Respondents

VALASQUEZ, PATTI A., Appellate Counsel for Defendants/Appellants/ Petitioners

WEST PENINSULAR TITLE COMPANY, Plaintiff/ Appellee/Respondent

WILLIAMS, GREGORY L., Trial and Appellate Counsel for Plaintiffs/Appellees/ Respondents

Respondents note that JEFFREY A. AMAN, JAMES A. MUENCH and JOAN O'DELL no longer have any interest in the outcome of this proceeding.

TABLE OF CONTENTS

	Page
Questions Presented	i
Certificate of Interested Persons and Corporate Disclosure Statement	ii
Table of Contents	iv
Table of Citations	v
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Summary of Argument	13
Reasons for Denying the Writ	16
I. No direct conflict exists.	16
II. Respondents have "standing" as corporate successor in interest of Palm Beach Farms and as successor in title and record fee simple owner of the strip parcels.	17
III. Respondents' claims were ripe.	20
IV. The district court properly denied the motion to dismiss for failure to join allegedly indispensable parties.	22

Contents

Page

V. The district court properly entered final judgment based upon the jury verdict and the pretrial stipulation. 24

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) 17

Anderson v. Town of Groveland, 113 So. 2d 569 (Fla. 2d DCA 1959) 19

Babbitt v. Farm Workers, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) 19

Ballard Medical Products v. Wright, 821 F.2d 642 (Fed. Cir. 1987) 23

Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 22 S. Ct. 698, 46 L. Ed. 968 (1902) 26

City of Miami v. Florida East Coast Railway Co., 79 Fla. 539, 84 So. 726 (1920) 18

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) 22

Contents

Page

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991) 19, 21

Ente Nazionale Idrocarburi v. Prudential Securities Group, Inc., 744 F. Supp. 450 (S.D.N.Y. 1990) 23

Estes v. Shell Oil Co., 234 F.2d 847 (5th Cir. 1956) 23

In re Caesars Palace Securities Litigation, 360 F. Supp. 366 (S.D.N.Y. 1973) 23

McVay v. Western Plains Service Corp., 823 F.2d 1395 (10th Cir. 1987) 23

Miree v. DeKalb County, 422 U.S. 25, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977) 17, 22

Morrison v. Genuine Parts Co., 828 F.2d 708 (11th Cir. 1987), *cert. denied*, 484 U.S. 1065, 108 S. Ct. 1025, 98 L. Ed. 2d 990 (1988) 25

Murray v. United States, 817 F.2d 1580 (Fed. Cir. 1987) 13, 16, 17

Pennell v. City of San Jose, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 1 (1988) 18, 19, 20

Region 8 Forest Service Timber Purchasers Council v. Adcock, 993 F.2d 800 (11th Cir. 1993), *cert. denied sub. nom., Southern Timber Purchasers Council v. Meier*, ___ U.S. ___, 114 S. Ct. 683, 126 L. Ed. 2d 651 (1994) 17, 18, 19, 20

Contents

Page

Sam Galloway Ford, Inc. v. Universal Underwriters Ins. Co., 793 F. Supp. 1079 (M.D. Fla. 1992) 26

Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) 22

Smith v. Blackburn, 785 F.2d 545 (5th Cir. 1986) 25

Town of Crystal River v. Williams, 61 So. 2d 382 (Fla. 1952) 19

United States v. One 1978 Bell Jet Ranger Helicopter, 707 F.2d 461 (11th Cir. 1983) 26

Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) 17

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) 14, 20

Statutes Cited:

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

28 U.S.C. § 1367 ..... 3, 12

Contents

Page

28 U.S.C. § 2201-2202 5

42 U.S.C. § 1983 2,5

42 U.S.C. § 1985 5

42 U.S.C. § 1985(3) 2

42 U.S.C. § 1988 .....2, 12, 15

United States Constitution Cited:

Fifth Amendment 2

Fourteenth Amendment, Section 1 2

Article III 17, 18, 19

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 22

Federal Rule of Civil Procedure 19 6,23

Federal Rule of Evidence 902(4) 6

Supreme Court Rule 10.1(a) 2

United States District Court for the Southern District of Florida, Local Rule 14, now Rule 16.1E 8,24

Contents

Page

Other Authority Cited:

Wright & Miller, *Federal Practice and Procedure:* Civil 2d § 1359 22

APPENDIX

Appendix A — Constitutional Provisions and Statutes Involved 1a

Appendix B — Plaintiff's Motion for Leave to Amend Dated October 21, 1988 ..... 5a

Appendix C — Order of the United States District Court, Southern District of Florida Filed December 1, 1988 .. 10a

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, West Peninsular Title Company, a Florida corporation, Absolute, Inc., a Florida corporation, and Marion H. Cooper, as Personal Representative of the Estate of Alfred R. Cooper, respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Eleventh Circuit's opinion below. That opinion is reported at 41 F.3d 1490 (11th Cir. 1995) and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 1 - 12 (hereinafter Pet. App. ___).

STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's certiorari jurisdiction under 28 U.S.C. § 1254 (1994), and Rule 10.1(a) of the Rules of the Supreme Court of the United States, allegedly based upon direct conflict with a case never cited by Petitioners in either of the courts below. Petitioners fail to advise the Court that both the District Court and the Court of Appeals for the Eleventh Circuit simply held Petitioners to the terms of the Pretrial Stipulation into which they freely entered. Thus, this case presents no question suitable for invocation of the Court's discretionary review powers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[1]

U.S. Const. amend. V

U.S. Const. amend. XIV, § 1

42 U.S.C. § 1983

42 U.S.C. § 1985(3)

42 U.S.C. § 1988

STATEMENT OF THE CASE

Much of Petitioners' Statement of the Case consists of matters outside the record, or of facts alleged but never made the subject of proof by affidavit or introduction of evidence at trial.[2]

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1. The text of the constitutional provisions and statutes involved are contained in the Appendix at pages 1a-4a. The Appendix to Respondents' Brief in Opposition is referred to hereinafter as Resp. App. __a.

2. The matters contained in the first full paragraph on page 9 of the (Cont'd)

Many of Petitioners' fact based arguments flatly contradict the record, including their own pleadings and the joint pretrial stipulation.[3] Respondents are unable to accept Petitioners' Statement of the Case and will therefore rely on their own statement, as set forth below.

The lengthy and somewhat complex history of this case began on March 15, 1988, when Respondents filed their verified complaint and demand for jury trial (the "complaint"), invoking the federal district court's original jurisdiction to consider federal claims to redress the deprivation of civil rights under color of law pursuant to 28 U.S.C. §§ 1331 and 1343 (R1-1-2).[4] Respondents also invoked the district court's supplemental jurisdiction to consider causes of action under state law which involved the same underlying facts as the federal claims (R1-1-2). 28 U.S.C. § 1367.

Respondents alleged that they were the successors in interest

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(Cont'd)

Petition, through the end of the first full paragraph on page 10 of the Petition, are outside the record in this case, or were alleged by Palm Beach County, but never made the subject of any proof by affidavit or evidence introduced at trial. Respondents invite Petitioners in any reply to cite *evidentiary* support for those allegations anywhere in the record in this case.

3. The Petition alleges that, "The action was against the County, even though the County did not claim a competing interest in the fee simple ownership of the strip parcel. . . ." Pet. at p. 14. As authority for that proposition, Petitioners cite the Appendix at page 80, which is a portion of the Verified Complaint and Demand for Jury Trial. Paragraph 28 of the Complaint states, "The County does not claim a fee simple interest in the Strip Parcels." In its Answer and Affirmative Defenses, "Defendants deny the allegations of paragraph 26, 27, and 28." AP. 111. *See also* Complaint, ¶ 35 (Pet. App. 82); Answer, ¶ 11 (Pet. App. 112).

4. Although the original complaint also alleged diversity of citizenship as an independent basis for federal jurisdiction, Respondents conceded the absence of complete diversity among the parties.

to The Palm Beach Farms Company ("Palm Beach Farms"), the original owner and offeror of certain described strips of land ("strip parcels") which had been offered for dedication to Palm Beach County (the "County") but not accepted by the County before the offer of dedication was revoked in accordance with Florida law (R1-1-7).

On June 24, 1986 the County enacted Ordinance No. 86-18 (the "ordinance"), which authorized the County to sell its easement and right of way interests ("public rights") in real property originally acquired by the County through dedication[5] in return for a "privilege fee" amounting to 80% of the fair market value of the underlying property encumbered by the public easement or right of way (R1-1-9). In return for its privilege fee, the County would issue a recordable bill of sale known as an "abandonment resolution" which was recorded in the public records and purported to "vest" the public rights in the name of the payor of the privilege fee, according to the language of the ordinance (R1-1-Ex. I, p. 11). Next, the property appraiser would list the payor of the privilege fee as the owner of the property for ad valorem tax purposes (R2-41A-2).[6] Presumably there was nothing irrational about the County's privilege fee for public rights scheme so long as its application was confined to pre-existing public rights acquired by dedication, as required by the ordinance. However, despite the facial limitation on the application of the ordinance to "public rights" first "acquired" by the County (*e.g.*, through dedication), the County began to collect privilege fees in return for abandonment resolutions for non-

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5. Although the ordinance provides for abandonment of property acquired by means other than dedication, dedication was the issue in this case.

6. The first amendment to the original complaint is found in the Respondents' motion for leave to amend complaint filed on October 21, 1988. (Resp. App. 5a-9a). Respondents' motion for leave to amend complaint was granted by Order dated December 1, 1988 (R3-43) (Resp. App. 10a).

existent public rights in Respondents' undedicated strip parcels.

The recorded abandonment resolutions coupled with the "vesting" language of the ordinance (incorporated by reference in the abandonment resolution) and the cooperation of the property appraiser's office conferred governmental legitimacy to a scheme that was well beyond what had been authorized by ordinance and placed a significant record cloud on Respondents' interest in the undedicated strip parcels. Respondents were unwilling to pay the privilege fee or otherwise submit to an ordinance which was facially inapplicable, and filed this action in federal district court.

Respondents alleged that the County was arbitrarily and capriciously applying the ordinance to the strip parcels which had never been dedicated, as the ordinance required, and in which the County had no public interest to sell (R1-1-10). Respondents also contended that the County's wrongful application of the ordinance to undedicated property coupled with the recordable abandonment resolution and the property appraiser's listing of the payor of the privilege fee as the owner of the property worked in combination to cloud and ultimately "take" Respondents' interest to the undedicated strip parcels as a matter of public record (R2-41A-3). Respondents also alleged and sought a declaration under Florida law that because the offer of dedication had not been accepted prior to revocation, the County has no interest in the strip parcels and that Respondents, as the successors of the offeror, were the fee simple owners (R1-1-19).

The complaint requested declaratory relief and various remedies under federal law; including relief from enforcement of an unconstitutional ordinance pursuant to 28 U.S.C. §§ 2201-2202 (R1-1-13-14), a permanent injunction enjoining the County's application of the ordinance to the undedicated strip parcels pursuant to 42 U.S.C. §§ 1983 and 1985, and damages

(R1-1-10-13; R2-41A). Respondents also sought declaratory relief under Florida law, including a determination that the strip parcels were never dedicated to the County, that Petitioners had no interest in the strip parcels as a matter of law and that Respondents were the fee simple owners (R1-1-10-20).[7] There were two amendments to the complaint (R2-41A; R7-136). The complaint, as amended, is referred to as the "complaint."

The County filed a motion to dismiss or for a more definite statement (R1-5). After the first amendment to the complaint (R2-41A) (Resp. App. 5a-9a), Petitioners filed a renewed (amended) motion to dismiss (the "motion to dismiss") (R3-45; R3-46). The motion to dismiss raised, among other things, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted and failure to join a party under Fed. R. Civ. P. 19. On January 20, 1989 the court entered an order reserving ruling on the motion to dismiss (R3-50), which the court denied after trial. (R8-171). On February 17, 1989, Petitioners filed their answer and affirmative defenses in which they denied the material allegations of the complaint, and asserted defenses which mirrored the defenses raised by motion to dismiss (R3-51). Respondents filed a reply denying the defenses (R3-52).

On November 20, 1989, Respondents filed their first motion for partial summary judgment, together with a memorandum of law (R4-67; R4-68), an affidavit in support (R4-66), and a request for judicial notice[8] of various public records including deeds (R4-65, Exhibits 1-5), and the County's answer, affirmative defenses, counterclaim for ejectment and quiet title in state court litigation (R4-65, Ex. 6). Although Petitioners filed a memorandum in

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7. Respondents withdrew this claim after trial (R14-204-7), and the district court therefore adjudged that it was moot (R8-181-3).

8. The request for judicial notice was filed pursuant to Federal Rule of Evidence 902(4).

opposition (R4-70), they neither objected to the request for judicial notice, nor filed any affidavits or other evidence in opposition.

After granting Respondents' request for judicial notice (R4-76), and hearing arguments, the district court granted Respondents' motion for partial summary judgment in part (R6-103), determining: (1) that the strip parcels were offered for dedication to the County by virtue of the recording of the plat; and (2) that Respondents' factually uncontested chain of title (as alleged in paragraph 18 of the complaint) "was true and correct" (R6-103-2).

On February 28, 1990, Petitioners filed a motion for summary judgment and memoranda of law, requesting summary judgment on allegedly undisputed "material facts" (R4-82). Although the motion states that they "have filed an Affidavit and would show that there is no issue . . . with regard to the matters presented . . ." (R4-82-1), no supporting affidavit was filed. Petitioners' unsupported motion for summary judgment was denied in its entirety (R6-103).

On September 7, 1990, Respondents filed their second motion for partial summary judgment and memorandum of law (R6-110; R6-111), requesting a determination that the offer of dedication of the strip parcels had been expressly revoked on September 9, 1976 and that prior to revocation, the County had not expressly or impliedly accepted the offer (R6-110-2).

Respondents requested and obtained judicial notice of an instrument entitled "Notice of Withdrawal of Platted Roads, Streets, and Other Unexercised Rights" (the "1976 notice of revocation") (R6-109). Petitioners neither objected to that request for judicial notice nor filed any affidavits in opposition to the motion. Instead, Petitioners served an unsworn pleading

entitled "statement of material facts in opposition to the plaintiffs' second motion for partial summary judgment," which listed six issues which remained "to be tried" (R6-112). Respondents' second motion for summary judgment was eventually granted in part, but only after the parties entered into the joint pretrial stipulation (R7-147).

On July 9, 1991, the parties filed a joint pretrial stipulation (the "stipulation") pursuant to Rule 14, Rules of the United States District Court for the Southern District of Florida (1991).[9] By stipulation, Petitioners abandoned all of their affirmative defenses for trial as the parties narrowed the trial issues to the County's implied acceptance of the offer of dedication.[10] As uncontested facts the parties stipulated and agreed: (1) that Respondents were the successors in interest to Palm Beach Farms; (2) that Respondents' chain of title was as alleged; and (3) that the recording of the plat constituted an offer of dedication (R7-142-3-4). The parties agreed that as a matter of law, "the recording of the plat constituted an offer of dedication which the County had a duty to accept within a reasonable period of time and in no event later than September 9, 1976, when the offer was revoked (to the extent that it had not previously been accepted)" (R7-142-4). The stipulation further outlined the agreement of the parties as follows:

> Although the complaint alleges *various causes of action and requests various remedies, the parties stipulate that three (3) factual issues will be presented to the jury.* Those issues are as follows:

---

9. The Local Rules of the Southern District have been re-numbered since the 1991 rules which were in effect at the time of the stipulation. The current counterpart to Rule 14 in the 1991 rules is Rule 16.1E in the 1995 rules.

10. The stipulated fact issue of implied acceptance was framed in three distinct questions, which are quoted below in their entirety.

> (1) Whether the County accepted the offer to dedicate the strip parcels within a reasonable time after August 20, 1912?
>
> (2) Whether the County accepted the offer to dedicate the strip parcels prior to September 9, 1976 [the date of express revocation]?
>
> (3) And if the answer to question number two (2) is "yes," whether the County intended to limit its acceptance to specific roads that were accepted by resolution or improvement?
>
> The parties further stipulate that in the event plaintiffs prevail on issue 1, 2, or 3 above, they *shall be entitled to the remedies requested in the complaint. In the event that plaintiffs do not prevail as provided above, they shall be entitled to none of the relief requested in the complaint*.

(R7-142-1-2; emphasis supplied).

On July 31, 1991 (after the stipulation had been filed with the district court), Respondents filed an uncontested motion for entry of order granting plaintiffs' second motion for partial summary judgment on issues resolved by stipulation (the "uncontested motion") (R7-145). The uncontested motion provided that "[t]he undersigned has conferred with counsel for Defendants and has been informed that Defendants do not contest this motion" (R7-145-1). The uncontested motion recited the particulars of the stipulation and requested entry of an order granting Respondents' second motion for partial summary judgment (which was still pending) on the issues resolved by stipulation. The uncontested

motion underscored the significance of the stipulation as follows:

> 3. On or about July 8, 1991, Plaintiffs and Defendants filed a Joint Pretrial Stipulation (the "Stipulation") *resolving several previously-contested factual and legal issues and significantly limiting the remaining issues to be presented to the jury (the "jury issues") with the agreement that, in the event that Plaintiffs prevail on the jury issues, they shall be entitled to the remedies requested in the Complaint (to be resolved in a subsequent hearing)* and further agreeing that in the event the Plaintiffs do not prevail on the jury issues, they shall be entitled to none of the relief requested in the Complaint.

(R7-145-3; emphasis supplied). Petitioners did not object to the uncontested motion.

On August 30, 1991, approximately ten months prior to trial, the district court entered an order adopting the stipulation, granting the uncontested motion, and granting Respondents' second motion for partial summary judgment in part (R7-147). As a result, the only fact issue remaining for trial was the stipulated issue of whether prior to September 9, 1976, the County had impliedly accepted the offer of dedication. At no time prior to or during the trial did Petitioners move to modify, amend or vacate the stipulation or the order granting the uncontested motion.

On June 23, 1992, the case proceeded to jury trial with the evidence limited in accordance with the stipulation. Petitioners did not raise or argue the motion to dismiss during trial. Approximately two weeks after the jury returned a verdict in

favor of Respondents, Petitioners filed a motion requesting that the district court rule on the motion to dismiss (R8-170). The legal defenses which served as the basis for Petitioners' motion to dismiss simply mirrored the affirmative defenses which were abandoned by stipulation. At trial, Petitioners offered no evidence of any of the abandoned affirmative defenses. By order dated July 8, 1992, the motion to dismiss was denied (R8-171).

The verdict form consisted of the three questions set forth in the stipulation (R7-162; R7-142-1-2). In responding "no" to the first question on the verdict form, the jury determined that the County did not "accept the offer of dedication within a reasonable time after August 20, 1912" (R7-162). The jury did not reach questions 2 or 3. After the jury verdict, proposed final judgments were submitted by both parties. The district court prepared and entered its own final order (R8-181).

During the period that the parties were submitting proposed final judgments, Petitioners filed objections to entry of Respondents' final judgment (R 8-174) ("Petitioners' objections"). In Petitioners' objections, they acknowledged that Respondents were "*entitled to a judgment finding that they are the fee simple title holders of the rights of way dedicated to the public by Palm Beach Farms Plat No. 3 and that Defendants have no further public interest under the dedication, in that property.*" (R8-174-6; emphasis supplied).

The district court entered judgment in favor of Respondents on the basis of the stipulation as a "contract" and partial "settlement" (R8-181-3). The district court determined and awarded the relief stipulated by the parties "as if a taking had occurred" (R8-181-3) by permanently enjoining application of the ordinance to the strip parcels and further providing the declaratory relief Respondents had requested in the complaint. The district court determined Respondents' entitlement to

attorneys' fees and costs as a contractual right under the stipulation (R8-181-4). Since the relief was founded on the stipulation as a partial settlement agreement between the parties, it was granted pursuant to the district court's supplemental jurisdiction over state claims. 28 U.S.C. § 1367.

Additionally, and independently, the district court found on the basis of its review of the entire record that the ordinance was unconstitutional as applied to the strip parcels. The district court enjoined enforcement, granted declaratory relief, and determined that Respondents were entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988 (R8-181-4). The district court did not award other remedies requested in the complaint such as damages, just compensation for the alleged taking or a constructive trust for abandonment proceeds.

After entry of the final judgment, Respondents filed their motion to tax attorneys' fees and costs, together with supporting affidavits, as provided in the final judgment (R9-183-187; R10-194-196). Petitioners opposed the motion (R9-188). On April 13, 1993, the district court entered an order granting Respondents' motion and awarded attorneys' fees and costs (R10-197).

Petitioners filed a notice of appeal from the final judgment (R9-182), and a notice of appeal from the order awarding attorneys' fees and costs to Respondents (R10-198). The two appeals were consolidated.

In a per curiam opinion, the Court of Appeals for the Eleventh Circuit affirmed the district court, stating: "Defendants raise several arguments, *hoping mainly to avoid concessions made in district court in the joint pretrial stipulation.* (Pet. App. 5) (emphasis added).

SUMMARY OF ARGUMENT

1. Petitioners seek to invoke this Court's certiorari jurisdiction to obtain relief from a pretrial stipulation freely entered into after three years of discovery; even though Petitioners failed to seek such relief from the district court before or after trial. The district court found that it "would be manifestly unjust not to enforce the stipulation due to [Respondents'] reliance on the stipulation at trial." (R8-181-3). Similarly, the Court of Appeals noted that "[Petitioners] raise several arguments, hoping mainly to avoid concessions made in district court in the pretrial stipulation." (Pet. App. 5.) Certiorari review never was intended to relieve litigants from the results of their own tactical decisions. Based upon the peculiar circumstances created by Petitioners' tactical decisions, any ruling necessarily would be confined to the facts of this case, and have limited general applicability.

2. The decision of the Court of Appeals for the Eleventh Circuit in this case does not conflict with the decision in *Murray v. United States*, 817 F.2d 1580 (Fed. Cir. 1987). *Murray* involved mortgagees who had not foreclosed their mortgage prior to the tax sale of the real property. Under North Dakota law, a mortgage created only a lien on real property, not an interest therein. In that context, the Court of Appeals for the Federal Circuit merely stated the obvious, "As to the real estate, the Claims Court correctly reasoned that only one possessing an ownership interest in the real property at the time of the taking is entitled to receive the required compensation." *Murray*, 817 F.2d at 1583. In this case, based upon the joint stipulation and the evidence submitted in support of the motions for summary judgment, the district court made a finding of fact that Respondents had a fee simple interest in the strip parcels. Moreover, in this case there was no award of just compensation for any alleged taking.

3. Respondents had standing to bring this action. The Verified Complaint and Demand for Jury Trial alleged that Respondents were "the fee simple owners of the strip parcels." (Pet. App. 81) In the Amended Complaint, Respondents alleged that Petitioners had applied the 1986 Ordinance and accepted petitions for abandonment filed by property owners adjacent to Respondents' strips, and had allowed those strips to be recorded on the State tax rolls as the property of those other property owners. (Resp. App. 6a-7a). In effect, Respondents alleged that they were the fee simple owners of the strip parcels, and that the County was purporting to convey some interest in those strip parcels to third parties. Those allegations alone satisfy the constitutional requirement for case or controversy, and gave Respondents standing to assert those injuries.

Respondents had standing as the corporate successors in interest to Palm Beach Farms, and as the successor in title as fee simple owner of the strip parcels. Either legally protected interest was sufficient to satisfy the "injury in fact" requirement of standing. Both were alleged in the complaint and otherwise affirmatively appear uncontroverted in the record. Respondents' interest as successor in interest to Palm Beach Farms was published to the jury as an uncontroverted fact without objection by Petitioners. The validity of Respondents' chain of title was independently established by summary judgment and stipulation as an uncontroverted fact.

4. Respondents' claims were ripe for adjudication. Petitioners' ripeness analysis misapplies *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985) because unlike *Williamson County*, this case involves an arbitrary and capricious due process claim which arises in a non-zoning context. No zoning ordinance, land use regulation, or permit denial was involved in this case. Respondents' claims were ripe when the County acted in an arbitrary manner by applying the ordinance to the undedicated

strip parcels. The district court properly denied the motion to dismiss for lack of subject matter jurisdiction.

5. The district court properly denied the motion to dismiss raising the failure to join allegedly indispensable parties. Petitioners abandoned this and all other affirmative defenses by pretrial stipulation and thereafter adduced no evidence at trial to prove or preserve this issue, except as a facial attack on the complaint. Petitioners can point to no record evidence establishing even the existence of so-called indispensable parties. The absence of a factual record confines this defense to the four corners of the complaint. No affidavit or other evidence was ever submitted to establish the names of so-called adjoining landowners, what land, if any, they own, where it is located, and whether what they own is in fact contiguous to the strip parcels. The defense was abandoned by pretrial stipulation and left abandoned at trial.

6. The district court did not abuse its discretion by entering judgment in accordance with the stipulation. The stipulation was entered into knowingly and voluntarily after three years of discovery. Neither before nor after trial did Petitioners make any effort to modify or amend the stipulation. The stipulation contains no misstatements of law and Petitioners have not argued otherwise. Petitioners have established no record from which to argue anything other than their desire to be relieved from the result of their own tactical decisions. The district court found that it would be manifestly unjust not to enforce the stipulation (R8-181-3).

7. On the basis of the stipulation as a partial settlement agreement, and independently under 42 U.S.C. § 1988, the district court properly awarded attorneys' fees and costs to Respondents.

REASONS FOR DENYING THE WRIT

I.

NO DIRECT CONFLICT EXISTS.

Petitioners assert as a basis for this Court's exercise of its discretionary jurisdiction, the existence of direct conflict between the decision of the Court of Appeals for the Eleventh Circuit in this case, and the decision in *Murray v. United States,* 817 F.2d 1580 (Fed. Cir. 1987). Petitioner's assertion of "direct conflict" fails to withstand analysis. The *Murray* case involved mortgagees who had not foreclosed their mortgage prior to the tax sale of the real property to satisfy IRS liens. Under North Dakota law, a mortgage created only a lien on real property, not an interest therein.

In that context, the Court of Appeals for the Federal Circuit merely stated the obvious, "As to the real estate, the Claims Court correctly reasoned that only one possessing an ownership interest in the real property at the time of the taking is entitled to receive the required compensation." *Murray,* 817 F.2d at 1583. In this case, based upon the joint stipulation and the evidence submitted in support of the motions for summary judgment, the district court made a finding of fact that Respondents had a fee simple interest in the strip parcels. (R8-181-3, 4) (Pet. App. 21). In light of that finding of fact of an ownership interest in the property, the decision in *Murray vs. United States* has no application to this case, and no conflict exists which would justify the exercise of the Court's certiorari jurisdiction. Moreover, in this case, there was no award of just compensation.

The Complaint in this case was filed on March 15, 1988. If the decision in *Murray* created the "direct conflict" asserted by Petitioners, then that decision would have been persuasive

authority in the district court and the Court of Appeals. Petitioners never cited the decision in *Murray v. United States* in either of the courts below. After more than seven years of hard fought litigation, Petitioners' claim to have located a 1987 case which directly conflicts with the decision of the Court of Appeals for the Eleventh Circuit in this case, represents yet another attempt to nullify the joint pretrial stipulation.

II.

RESPONDENTS HAVE "STANDING" AS CORPORATE SUCCESSOR IN INTEREST TO PALM BEACH FARMS AND AS SUCCESSOR IN TITLE AND RECORD FEE SIMPLE OWNER OF THE STRIP PARCELS.

A central component of Article III's case or controversy requirement is that the litigant must have standing to invoke the power of the federal court. *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984). By motion to dismiss, Petitioners challenged the sufficiency with which the complaint alleged Respondents' standing. "When the defendant challenges standing via a motion to dismiss, both the trial and reviewing courts 'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Region 8 Forest Service Timber Purchasers Council v. Adcock*, 993 F.2d 800, 806 (11th Cir. 1993), *cert. denied sub. nom., Southern Timber Purchasers Council v. Meier*, ___ U.S. ___, 114 S. Ct. 683, 126 L. Ed. 2d 651 (1994), *citing Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). Every doubt must be resolved in the non-moving party's favor, and all well-pleaded allegations of the complaint must be accepted as true. *Miree v. DeKalb County*, 422 U.S. 25, 27 n. 2, 97 S. Ct. 2490, 2492 n. 2, 53 L. Ed. 2d 557 (1977).

Petitioners' post-trial concession belies the assertion that there was no injury in fact.

> Pursuant to the jury's verdict, [Respondents] are only entitled to a judgment finding that they are the fee simple title holders of the rights of ways dedicated to the public by Palm Beach Farms Plat No. 3 and that [Petitioners] have no further public interest under the dedication, in that property.

(R8-174-6).

Under Article III's case or controversy requirement, "plaintiff must have [first] suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' " *Region 8*, 993 F.2d at 805. The allegation of ownership of the property to which the ordinance was allegedly improperly applied was sufficient to meet the pleading threshold of standing. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 1 (1988). Respondents alleged two distinct legally protected interests which were "concrete," "particularized," and "actual" rather than "conjectural" or "hypothetical." At paragraphs 11 and 12 of the complaint Respondents alleged their legally protected interest as corporate "successors in interest to Palm Beach Farms" (R1-1-3). At paragraph 32 Respondents alleged their legally protected interest as successors in record title as "fee simple owners of the strip parcels" (R1-1-9). Respondents alleged that the strip parcels had never been "dedicated" to the County (R1-1-8).

As a matter of Florida law, in the absence of dedication the County has no "public interest" in the strip parcels. *City of Miami v. Florida East Coast Railway Co.*, 79 Fla. 539, 84 So. 726 (1920). In the absence of acceptance of the offer of dedication, the offeror [Palm Beach Farms] or its successor in interest [Respondents] is the "owner of the unencumbered fee with full

power to sell or dispose of said lands in any lawful manner." *Anderson v. Town of Groveland*, 113 So. 2d 569, 571 n. 5 (Fla. 2d DCA 1959). *See also Town of Crystal River v. Williams*, 61 So. 2d 382 (Fla. 1952).

Standing also requires "a causal connection between the injury and the conduct complained of" . . . "fairly tracable to the challenged action of the defendant . . ." *Region 8*, 993 F.2d at 805. Respondents specifically and repeatedly alleged that it was the "enforcement" of the ordinance against the undedicated strip parcels that was depriving them of their property (R1-1-10-13) and causing them irreparable harm (R1-1-11-12). Even "the likelihood of enforcement . . . is a sufficient threat of actual injury to satisfy Article III's requirement that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 855 (1988), *citing Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2305, 60 L. Ed. 2d 895 (1979). To prevail on an arbitrary and capricious due process claim, Respondents need "only prove that the government acted arbitrarily and capriciously." *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991).

The ordinance requires that the County first have a public interest acquired by dedication (R1-1-Ex. I-1). The ordinance defines a right of way as "any strip of land *dedicated* or deeded for ingress and egress for access purposes" (R1-1-Ex. I-3; emphasis supplied). The complaint alleges the County's unconstitutional "enforcement" of the ordinance against the *undedicated* strip parcels (R1-1-11-14). As a result, independent of the County's application of the ordinance to the undedicated strip parcels, plaintiffs alleged significant injuries, including a "taking" (R1-1-10, 12-13; R2-41A-3). The application of the ordinance by

recordation of an abandonment resolution purported to "vest" title in a third party payor of a privilege fee and authorize the additional privilege (conferred by the property appraiser's office) of having the property listed in the name of the payor as owner (R1-1-Ex. I, p. 12). As the district court noted, the County's application of the ordinance to the undedicated strip parcels "placed a *cloud* on plaintiffs' title to the land which necessitated the filing of the instant lawsuit . . ." (R8-181-4; emphasis supplied).

Standing also requires that it be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Region 8*, 993 F.2d at 805. Clearly, it was likely rather than speculative that injunctive relief would provide redress by prohibiting the prospective application of the ordinance to the undedicated strip parcels.

The complaint alleges the unconstitutionality of the ordinance, the taking and deprivation of Respondents' property without due process, and that the County acted arbitrarily and capriciously (R1-1-11-13). The allegations of the complaint, which must be taken as true, were sufficient to deny the motion to dismiss at the pleadings stage, under the standards set forth in *Pennell* and *Region 8*.

III.

RESPONDENTS' CLAIMS WERE RIPE.

Petitioners rely upon ripeness cases that apply in zoning, land use and permit cases. The challenged ordinance had no resemblance to a zoning or land use regulation. The finality prong of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), does not apply to Respondents' non-

zoning, substantive due process claim. *Eide v. Sarasota County*, 908 F.2d at 724 n.13. The claim arises "the moment the government acts in an arbitrary manner and (in an as applied challenge) that arbitrary action is applied to the owner's property." *Id.* (emphasis supplied) The substantive due process claim was ripe the "moment" the ordinance was applied to the undedicated strip parcels. *Id.*

> The ripeness of an as applied arbitrary and capricious due process claim depends upon the *nature of the claim*, which is often revealed by the *remedy sought*. We can conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act.

Eide, 908 F.2d at 726 (emphasis supplied). Ultimately Respondents sought only "an injunction against similar irrational decisions" to apply the ordinance to the undedicated strip parcels, and did not attempt to prove or recover damages.

The Court of Appeals for the Eleventh Circuit held that:

> Because we conclude that plaintiffs' arbitrary and capricious due process claim was ripe, we say nothing [about] whether plaintiffs' additional constitutional claims were ripe. We do note, however, that plaintiffs were not granted relief pursuant to a specific claim. Instead, the County stipulated that plaintiffs would be entitled to the remedies requested if plaintiffs prevailed on any of the disputed fact issues.

Palm Beach County v. West Peninsular Title Co., 41 F.3d at 1492 n.3 (Pet. App. 9). Respondents' claim was ripe "as soon as the County applied the ordinance and the petition process (including a $400 nonrefundable application fee) to the undedicated strip parcels." *Id.* at 1492 (Pet. App. 10).

IV.

THE DISTRICT COURT PROPERLY DENIED THE MOTION TO DISMISS FOR FAILURE TO JOIN ALLEGEDLY INDISPENSABLE PARTIES.

A Rule 12(b)(6) motion should not be granted "unless it appears beyond doubt that the [opposing party] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). In making that determination, the complaint should be construed in the light most favorable to the party against whom the motion is directed. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974). Every doubt must be resolved in the opponent's favor, and all well-pleaded allegations of the complaint must be accepted as true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2, 97 S. Ct. 2490, 2492 n. 2, 53 L. Ed. 2d 557 (1977).

Petitioners argue that Respondents failed to join indispensable parties. (Pet. at 41-42). When a litigant asserts that there are indispensable parties to an action, that party bears the burden of showing the existence of absent parties and the nature of their unprotected interests. Wright & Miller, *Federal Practice and Procedure:* Civil 2d § 1359. Petitioners did neither, nor could they under applicable Florida law. Here, Petitioners raised the defense of failure to join indispensable parties in their motion to dismiss (R3-45-4), and as an affirmative defense (R3-51-5). Petitioners failed to file affidavits or otherwise adduce evidence to establish the existence of adjoining owners or to corroborate the contiguity of their undescribed property. They failed to meet

their *factual* burden of proving the existence of absent parties and the nature of their interests. Thus, the issue was not developed factually or preserved except as a facial attack on the complaint.

Instead, Petitioners abandoned the defense by stipulation and offered no evidence of necessary or indispensable parties at trial. Thus, there is no basis in the record for this Court to find that Respondents failed to join indispensable parties. An appellate court may only consider the record as it was made before the district court. *Ballard Medical Products v. Wright*, 821 F.2d 642 (Fed. Cir. 1987). A motion to dismiss for failure to join indispensable parties "must be premised upon credible evidence which supports [the movant's] claim that such parties exist and identifies those persons who are claimed to be indispensable. Absent such evidence, this Court would be forced to make its decision *in vacuo*." *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 395 (S.D.N.Y. 1973) (emphasis in original), *citing Estes v. Shell Oil Co.*, 234 F.2d 847, 852 (5th Cir. 1956).

In determining whether to dismiss a case for failure to join indispensable parties, "[t]he major question is whether the court can render a decision which will not impair the rights of the absent party." *Ente Nazionale Idrocarburi v. Prudential Securities Group, Inc.*, 744 F. Supp. 450, 456 (S.D.N.Y. 1990). Since Respondents' claims for relief were entirely predicated on the assertion that Petitioners had no *public rights* in the strip parcels, there can be no sense in which the district court's determination runs afoul of Rule 19.

It is within the sound discretion of the trial court to determine the issue of the indispensability of a party to an action, and that decision will not be reversed absent an abuse of discretion. *McVay v. Western Plains Service Corp.*, 823 F.2d 1395, 1401 (10th Cir. 1987). In view of the stipulation, the jury's verdict, the absence of any evidence in the record which would support a

defense of failure to join indispensable parties, and the nature of the relief obtained by Respondents, the district court did not abuse its discretion in declining to dismiss this case on the ground of failure to join indispensable parties.

The Court of Appeals for the Eleventh Circuit correctly held that:

> It was no abuse of discretion for the district court to refuse to dismiss this case for failure to join indispensable parties. The County, as movant, had the burden "to show the nature of the unprotected interests of the absent parties." [Y]et, the County's citation to the record reveals only that it established the existence of adjoining landowners (not the nature of the allegedly unprotected interests).

Palm Beach County v. West Peninsular Title Co., 49 F.3d at 1492 (citations omitted) (Pet. App. 9).

V.

THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENT BASED UPON THE JURY VERDICT AND THE PRETRIAL STIPULATION.

The joint pretrial stipulation was prepared and filed pursuant to Local Rule 14. Almost one year passed between its filing and trial. The uncontested motion was filed quoting the stipulation (R7-145), and the order granting the Respondents' second summary judgment was entered thereafter without objection (R7-147).

The stipulation documents four (4) stipulated facts and four (4) uncontested facts (R7-142-3-4). It states only one "issue of

law on which there is agreement," which merely recited the basic law of dedication applicable to the facts (R7-142-4). Finally, it confirmed Respondents' entitlement to unspecified remedies if they prevailed in the jury trial.

The parties narrowed the fact issue to that of "implied acceptance." Nothing in the record establishes that such a narrowing of the issues was manifestly unjust. After three years of litigation, presumably both sides had the perspective to recognize and concede facts that no longer were reasonably in dispute. By stipulation, Petitioners voluntarily relinquished their right to adduce evidence on their affirmative defenses. There is nothing in the record to demonstrate that after three years of discovery, Petitioners' voluntary abandonment of its affirmative defenses was improper.

By stipulation, Petitioners conceded the validity of Respondents' chain of title (R7-142-4). Shortly after trial, Petitioners conceded that Respondents were "entitled" to a judgment "finding that they are the fee simple title holders of the rights of way . . . and that defendants have no further public interest under the dedication under that property" (R8-174-6). Certainly Petitioners had the right to concede that factual issue. This Court's certiorari jurisdiction should not be invoked to relive Petitioners from the result of their tactical decisions.

In reviewing a district court's enforcement of a pre-trial stipulation, "the district court has broad discretion in determining whether to hold a party to its stipulation, . . ." *Morrison v. Genuine Parts Co.*, 828 F.2d 708, 709 (11th Cir. 1987), *cert. denied*, 484 U.S. 1065, 108 S. Ct. 1025, 98 L. Ed. 2d 990 (1988). Moreover, the determination of whether the enforcement of a stipulation would be "manifestly unjust" must be "based on the record." *Smith v. Blackburn*, 785 F.2d 545, 549 (5th Cir. 1986). Here, no record of manifest injustice exists.

Pre-trial stipulations are encouraged in order to promote judicial economy and dispense with matters that are not really at issue. *Sam Galloway Ford, Inc. v. Universal Underwriters Ins. Co.*, 793 F. Supp. 1079, 1082 (M.D. Fla. 1992), *citing Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 22 S. Ct. 698, 46 L. Ed. 968 (1902). *See also United States v. One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 463 (11th Cir. 1983). Although stipulations may be set aside to avoid manifest injustice, pre-trial stipulations should not be set aside "if doing so would *unfairly* prejudice the opposing side." *Sam Galloway Ford, supra* at 1082 (emphasis in original). As the district court observed, "in this case, the manifest injustice would result only if the stipulation were *not* enforced due to the [Respondents'] reliance on the stipulation at trial" (R8-181-3; emphasis the court's).

The district court did not abuse its discretion by entering final judgment and awarding remedies in accordance with the plain language of the stipulation.

CONCLUSION

Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix A

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3):

> (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more

persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not

adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX B — PLAINTIFF'S MOTION FOR LEAVE TO AMEND DATED OCTOBER 21, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO. 88-8111-CIV-GONZALEZ

WEST PENINSULAR TITLE COMPANY, a Florida corporation, ABSOLUTE, INC., a Florida corporation, and MARION H. COOPER, as Personal Representative of the Estate of Alfred R. Cooper,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision of the State of Florida, and CAROL A. ROBERTS, Chair of the BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY,

Defendants.

PLAINTIFFS' MOTION FOR LEAVE TO AMEND

COME NOW the Plaintiffs, WEST PENINSULAR TITLE COMPANY, ABSOLUTE, INC. and MARION H. COOPER, by and through their undersigned counsel, and hereby move this Court for leave to file an amendment to their Complaint, and would state:

1. In March, 1988, the Plaintiffs filed their Complaint against the Defendants, alleging confiscatory taking claims of the Plaintiffs' property in violation of 42 U.S.C. Section 1983.

Appendix B

2. As mentioned paragraphs 29, 30, 34, 35, 73 and 74 of the Complaint, Defendant PALM BEACH COUNTY has granted petitions for abandonment and passed resolutions pursuant to the 1986 ordinance, purporting to convey right and interest in Plaintiffs' property to petitioning adjacent owners ("adjacent owners"), in exchange for the adjacent owners' payment of 80% of the tax appraised value of the property to Defendant PALM BEACH COUNTY.

3. Subsequent to the filing of their Complaint, the Plaintiffs learned that certain of these adjacent owners who were granted "abandonment rights" and received resolutions as such from the Defendants, have filed such resolutions with the Palm Beach County Clerk. Accordingly, the Defendants have caused the resolutions to be accepted as "deeds" which are placed upon the tax roles of Palm Beach County. By causing these adjacent owners to be placed upon the tax roles, Palm Beach County effectively and implicitly designates the successful abandonment petitioners/adjacent owners as the record "title holders" and "owners" of the property strips in question. Accordingly, the Defendants are effectively conveying interests of public record to third party adjacent owners, for properties which the Plaintiffs are claiming to have exclusive right, title and interest in.

4. Accordingly, the Plaintiffs request leave to amend and supplement their Complaint with the following general allegations, or allegations to the following effect:

> "Pursuant to application of the 1986 ordinance in question, the Defendants have entertained and granted petitions for abandonment filed by property owners adjacent to the Plaintiffs' strips, in exchange

for payments of funds equal to eighty percent of the appraised value of said strips.

Following the granting of petitions for abandonment and acceptance of funds therefor, the Defendants caused the successful abandonment petitioners/adjacent owners to be placed on the state tax roles, suggesting and/or indicating in the public tax records that the adjacent owners are record title holders of the property strips owned by the Plaintiffs.

As a result of designations of the adjacent owners as record title holders, the application of the 1986 ordinance by the Defendants effects a confiscatory taking of the Plaintiffs' property to Plaintiffs' detriment, without just compensation, in violation of 42 U.S.C. Section 1983."

5. The Plaintiffs shall be able to more effectively present their confiscatory taking claims pursuant to Section 1983 if the above-described amendment to the Complaint is allowed, in order to allege and demonstrate with greater detail the damage caused by application of the 1986 ordinance enacted by Defendants.

MEMORANDUM OF LAW

Rule 15(a), Federal Rules of Civil Procedure, provides that following the service of the adverse party's responsive pleading, "a party may amend his pleading only by leave of court . . . and

leave shall be *freely* given when justice so requires." Rule 15(b) allows amendments in order to conform the pleadings to new evidence. "There is a *strong* policy embodied in the Federal Rules of Civil Procedure, and Rule 15 particularly, favoring the *liberality* of amendment." *Borden v. Florida East Coast,* 772 F.2d 750, 757 (11th Cir., 1985). It is favored for a district judge to permit a party to amend its complaint in order to conform with evidence acquired through discovery, even when close to trial. *Borden, supra.* An abuse of discretion will generally occur by denying leave to amend, where a plaintiff seeks an amendment following diligent discovery, and moves for leave to amend his complaint promptly upon discovering basis for new allegations. *Auster v. Stream,* 764 F.2d 381, 391 (5th Cir., 1985).

WHEREFORE, Plaintiffs respectfully request this Court to grant leave to file the proposed amendment to their Complaint incorporating new allegations derived from recent discoveries.

SMITH & WILLIAMS, P.A.

By: s/ Samuel R. Mandelbaum
SAMUEL R. MANDELBAUM, ESQUIRE
100 South Ashley Drive
Suite 1170
Tampa, Florida 33602
(813) 223-1068
ATTORNEYS FOR PLAINTIFFS

Appendix B

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to William J. Capito, Esquire, Assistant County Attorney, Post Office Box 1989, West Palm Beach, Florida 33402; Joan E. O'Dell, Attorney, 703 South Lake Drive, Lantana, Florida 33462; and Glenn J. Garrett, Esquire, of Spear & Deuschle, P.A., 800 S.E. 3rd Avenue, Ft. Lauderdale, Florida 33316, this 21 day of October, 1988.

s/ Samuel R. Mandelbaum
SAMUEL R. MANDELBAUM, ESQUIRE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA FILED DECEMBER 1, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-8111-CIV-GONZALEZ

WEST PENINSULA TITLE COMPANY, et al.,

Plaintiffs,

v.

PALM BEACH COUNTY, etc. et al.,

Defendants.

ORDER

THIS CAUSE has come before the court upon the plaintiffs' Motion For Leave To Amend Complaint. The court has considered the motion and, being otherwise duly advised, it is

ORDERED AND ADJUDGED that plaintiffs' Motion For Leave To Amend Complaint be and the same is hereby GRANTED pursuant to Rule (15a) of the Federal Rules of Civil Procedure. Plaintiffs' Complaint is hereby deemed AMENDED as per plaintiffs' motion.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 1st day of December, 1988.

s/ Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE
JOSE A. GONZALEZ, JR.

cc: all counsel